



February 7, 2020

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

RE: *Sappony Tribe's Response to FERC's Request for Comments on the Draft Programmatic Agreement for the Southgate Extension of the Mountain Valley Pipeline Associated with Docket No. CP19-14-000*

Dear Secretary Bose:

The Sappony Tribe ("Tribe") previously filed an objection on January 16, 2020, to FERC's distribution of a draft Programmatic Agreement (PA) regarding the Mountain Valley Pipeline Southgate Project that was developed without the Tribe's input and does not recognize the Tribe as a consulting party or an invited signatory. The Tribe renews its objection. FERC's request for comments is premature. FERC has not complied with Section 106 of the National Historic Preservation Act or with consultation requirements under NEPA.

FERC has placed the Tribe in an impossible situation by requesting comments on a Draft PA that they cannot possibly opine about because FERC has failed to consult in a meaningful way required by law. Consultation is "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process." 36 C.F.R. § 800.16(f).

By definition, consultation requires an active, good faith exchange of ideas and information between a federal agency and other Section 106 participants that seeks consensus about what eligible or listed archaeological sites may be affected by an undertaking; why those properties are significant and of value, and to whom; and how any adverse effect to them might be avoided, minimized, or mitigated. See "Protecting Historic Properties: A Citizen's Guide to Section 106 Review," available at www.achp.gov/citizensguide.html. But none of these Section 106 steps has happened.

Instead, FERC has engaged in rush job and ignored its consultation responsibilities. Consultation does not take place when FERC—as it has done here—cuts and pastes from another PA, in this case an unrelated Port Arthur Project in Louisiana that is over 1,000 miles away. See Exhibit A (Email dated Jan. 8, 2020, from Paul Friedman, FERC, to Roger Kirchen et al.). Likewise, FERC's blatant attempt to rush the PA means that it is abrogating its responsibilities to comply with the NHPA. Mr. Friedman notes that "in this case we are trying to execute the PA prior to the Commission decision. This is to allow the 106 process to be

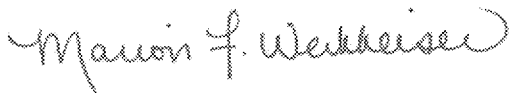
completed for our federal cooperating agencies so they can issue their permits.” We write to put those federal cooperating agencies on notice that FERC is not in compliance with Section 106 and those agencies should not adopt FERC’s decisions. Reliance by cooperating agencies on FERC’s flawed review process will mean that any permitting decisions rendered by cooperating agencies are also arbitrary and capricious.

Here, FERC has failed to consult meaningfully in good faith with the Tribe. The Tribe requested consulting party status on MVP Southgate in a letter filed on the docket on August 3, 2018-- more than 18 months ago. FERC has yet to respond to that request. FERC has never contacted the Tribe to consult on any steps of the Section 106 process, and now distributes a draft PA with no mention of the Tribe, and no signature block for the Tribe as an invited signatory or a consulting party. The Tribe was not even copied on Mr. Friedman’s email to other tribes and state historic preservation offices requesting comment on the draft PA. Because of the Tribe’s longstanding ties to the area’s historic and cultural heritage, the Tribe has a demonstrated interest in the Southgate Extension’s outcome. However, by failing to recognize the Tribe as a consulting party and to consult meaningfully with the Tribe as required by Section 106 of the National Historic Preservation Act and NEPA, FERC has created a flawed review process and unnecessary litigation risk for FERC, cooperating agencies, and NextEra Energy.

Please let us know—as counsel to the Tribe—when FERC intends to consult with the Tribe to discuss the Tribe’s concerns. A first step would be for FERC to consult meaningfully with the Tribe to establish a reasonable schedule for Section 106 compliance. Until FERC consults with the Tribe in good faith and stops presenting documents to the Nation for comment as if they are “done deals” on a one-way street, and indeed with no mention of the Tribe, FERC’s Section 106 review and NEPA process will continue to be meaningless. Unless FERC takes a step back and restarts the review process required by Section 106 of the National Historic Preservation Act to include consultation with the Sappony Tribe, other tribes, and consulting parties, FERC will ensure that any permitting decision regarding Southgate is arbitrary, capricious, and contrary to law.

Finally, we again request that all correspondence on this consultation be sent to my attention as the Tribe’s counsel.

Sincerely,

A handwritten signature in cursive script that reads "Marion F. Werkheiser".

Marion F. Werkheiser, Attorney at Law
Counsel to the Sappony Tribe

cc: David R. Cooper, Chief Counsel
U.S. Army Corps of Engineers

William T. Walker, Chief
Regulatory Branch, U.S. Army Corps of Engineers (Norfolk District)

David E. Bailey, District Engineer (Wilmington District)
Regulatory Division, U.S. Army Corps of Engineers (Wilmington District)

Pete Benjamin, Field Supervisor (North Carolina)
Raleigh Field Office, U.S. Fish and Wildlife Service

Cindy Schulz, Field Office Supervisor (Virginia)
U.S. Fish and Wildlife Service

Reid Nelson, Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation

John Eddins, Program Analyst
Office of Federal Agency Programs
Advisory Council on Historic Preservation

William Dancing Feather, Native American Program Analyst
Office of Native American Affairs
Advisory Council on Historic Preservation

Julie Langan, Director
Virginia Department of Historic Resources

Elizabeth S. Merritt, Deputy General Counsel
National Trust for Historic Preservation

William Lavarco, Counsel
NextEra Energy

Samantha Beers, Supervisor
Environmental Protection Agency

Barbara Okorn, Region 3 NHPA Coordinator
Environmental Protection Agency

EXHIBIT A

From: Paul Friedman <Paul.Friedman@ferc.gov>

Sent: Wednesday, January 8, 2020 11:17 AM

To: Kirchen, Roger

<roger.kirchen@dhr.virginia.gov>; julie.langan@dhr.virginia.gov; kevin.cherry@ncdcr.gov; ramona.bartos@ncdcr.gov; todd.m.miller@usace.army.mil; david.e.bailey2@usace.army.mil; Kaleigh Pollak

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Cc: James Martin <James.Martin@ferc.gov>; Amanda Mardiney

<Amanda.Mardiney@ferc.gov>; Allen Jacks <allen.jacks@cardno.com>; Jennifer Ferris (Jennifer.Ferris@cardno.com) <Jennifer.Ferris@cardno.com>

Subject: Southgate Project - CP19-14 - Draft PA

Dear Consulting Parties for the Southgate Project (FERC Docket Bo, CP19-14): Attached you will find a DRAFT PROGRAMATIC AGREEMENT (PA) for your review. We would appreciate your comments on this draft within 30-days – prior to Feb. 7.

After considering comments we will issue a FINAL for your signatures.

The ACHP has declined to participate – so this will be a three-party PA – executed when signed by the SHPOs of VA and NC.

This PA is roughly based on a document we recently executed for the Port Arthur Project. However, in this case we are trying to execute the PA prior to the Commission decision. This is to allow the 106 process to be completed for our federal cooperating agencies so they can issue their permits.

Because of FERC's ex-parte rules we have to issue this as a public document. However, you can still call me with questions. – Paul Friedman – FERC Project Archaeologist (202-502-8059)